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Problem-Solving Advocacy in Mediations

Harold I. Abramson
Touro Law Center, habramson@tourolaw.edu

Problem-Solving Advocacy in MEDIATIONS

BY HAROLD I. ABRAMSON

In a new book entitled *Mediation Representation: Advocating in a Problem-Solving Process* (NITA 2004), from which this article is adapted, Hal Abramson developed a practical, mediation-representation formula for attorneys advocating in mediation as a problem-solving process. Among other things, the formula includes how to satisfy the client's interests and overcome impediments to settlement, and knowing how, during key junctures in the mediation, to enlist the assistance of the mediator while negotiating with the other side. To obtain a copy of the book, call 800-225-6482 or visit the NITA Web site at www.nita.org.

Hal Abramson is a professor of law at the Touro Law Center in Huntington, N.Y. He is also a mediator and arbitrator of domestic and international disputes. He serves on the mediation panels of the American Arbitration Association, the CPR Institute for Dispute esolution, and the U.S. District Court for the Eastern District of New York. He can be reached by e-mail at ala@Tourolaw.edu.

The mediation process is indisputably different from other dispute resolution processes. Therefore, the strategies and techniques that have proven so effective in settlement conferences, arbitration and litigation do not work as well in mediation. The familiar adversarial strategy of presenting the strongest partisan arguments and aggressively attacking the other side's case may be effective in court where each side is trying to convince a judge to make a favorable decision. But, in mediation, there is no third-party decision maker, only a third-party facilitator who is not the primary audience. The primary audience is the other side who is surely not neutral and can often be quite hostile. In this representational setting, the adversarial approach is less effective, if not self-defeating. A different approach is needed, one tailored to realize the full benefits of mediation. That approach is creative problem solving.

A creative problem solver does more than just try to settle the dispute. A creative problem solver searches for solutions that go beyond the traditional and can benefit both parties; she develops a collaborative relationship with the other side and the mediator; and she participates throughout the mediation in a way that is likely to result in enduring, inventive solutions. Enduring because both sides work together to fashion solutions that they both understand, are willing to live with, and know how to implement. Inventive because the parties focus on their interests instead of legal positions, overcome impediments and search for multiple options, which they evaluate and package in an imaginative way to satisfy those interests.

My book, *Mediation Representation*, examines how the problem-solving negotiator advocates throughout the mediation process. This article is adapted from the first chapter, which focuses on how to be a problem-solving negotiator even when facing adversarial negotiators and when disputes seem to be only about money. If you are a competent negotiator, you possess the essential skills to be a problem-solving advocate in mediation.

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Negotiations in Litigation

The negotiations discussed in this article involve cases filed in court or moving toward court. Throughout the litigation process, litigators typically try to negotiate a settlement, right up to the doorsteps of the courthouse. In these settlement negotiations, litigators for both sides argue that their side is likely to win and use the predicted outcome at trial as the reference point for forming settlement proposals and compromises. These are typically adversarial negotiations.

In these negotiations, each side generally starts with an extreme position and then makes calibrated concessions until they are close enough to either split the difference or adopt one of the last offers on the table. Each side prepares for the negotiations by forming a target goal, a "bottom line," and an opening-offer strategy. Then, at the negotiating table, the parties engage in a "negotiation dance" of offers, counteroffers, compromises, and concessions.

Adversarial negotiators frequently view their dispute as primarily a distributive contest over who gets the largest piece of the targeted resource (usually money). Take this hypothetical:

> *Stephen Saleson owns a small company called* Shirts for You. *The company sells several major brand name shirts to retail outlets. Stephen and Philip Upton are the salesmen for the company. When Stephen hired Philip several years ago, Philip signed an employment contract providing if he leaves his position, he would not compete against* Shirts for You *within the city of Buffalo for three years. Stephen spent considerable time teaching Philip the "secrets" of good salesmanship. Philip quickly learned the job and did superlative work solidifying and maintaining existing customers in Buffalo. Unfortunately, the personal relationship between Philip and Stephen soured during their third year together. Philip felt that Stephen was preventing him from developing new customers. So he quit the sales position and started his own business selling a different brand of shirts. Because Philip had become such an excellent salesman, he was able to secure a group of retail customers in Buffalo that Stephen had never solicited for sales. Stephen decides to sue Philip for breach of contract seeking an injunction and damages for lost sales. Philip denies breaching the non-compete clause because he is selling a different brand of shirts to a different group of retail customers in Buffalo.*

In this situation, Stephen no longer sees Philip as his friend and protege—he is an adversary. Thus, Stephen has difficulty seeing any merit to Philip's position that he is not competing when he sells a different brand of shirts to different customers. Viewing the case as a distributive contest, Stephen sees a pie of $100,000 that Philip stole from him. The negotiation is over how to split that pie, and Stephen, of course, wants it all.

When both sides thinks the dispute is about money and who is right and who is wrong, they are framing the dispute in a very narrow way. This prevents them from seeing other issues and opportunities for mutually beneficial trades.

"A creative problem solver does more than just try to settle the dispute. A creative problem solver ... participates throughout the mediation in a way that is likely to result in enduring, inventive solutions."

Another aspect of adversarial negotiations is the manipulation of information. The adversarial negotiator sees information as power, so he will hide and engineer it to gain advantages. He also will hide vital information to avoid sacrificing an advantage at trial and will mislead the other side about his bottom line. For instance, in the hypothetical, Stephen's attorney might not disclose Stephen's interest in having Philip come back to work at *Shirts for You* because Philip could exploit this disclosure in the negotiations by exacting a reduction in the damages claim in exchange for coming back to work.

A persistent and vital question in adversarial settlement negotiations is—Who should make the first offer? The first offer communicates valuable information that impacts directly on how the negotiations will unfold.

Clearly, the first offer locks in the maximum or minimum settlement amount. Thus, if in the hypothetical, Stephen puts on the table an offer of $100,000, he has foreclosed any chance of getting more money.

The initial offer also anchors the adversary's view of the case's settlement value. In the hypothetical, Philip might not know his exposure until Stephen presents his $100,000 offer.

A realistic first offer usually indicates that the offeror is serious about settling the dispute. A too extreme or conservative first offer strongly

suggests that the offeror did not do his homework, made faulty assumptions, or is adopting a highly competitive and potentially dysfunctional strategy that could provoke a breakdown in negotiations.

Attorneys have different views on who should make the first move. Some like presenting the first offer in order to benefit from the adversary's inadequate preparation. Others like to go last, hoping to benefit from the adversary's miscalculation. For example, in the hypothetical, if Philip had earned $300,000 when he went out on his own, Stephen's demand of $100,000 would inure to Philip's benefit, since Stephen's demand establishes the top of the bargaining range for this dispute.

During the negotiation dance, an adversarial negotiator may press false demands and appear to have limited settlement authority. He may threaten to drag the adversary through lengthy and expensive court proceedings. The strategic use of information permeates every move.

Adversarial negotiation focus only on solving the monetary problem framed in the legal papers. As a negotiation session nears the end, the parties may feel pressure to split the difference between their positions and make last minute concessions. Suppose in the hypothetical, the attorneys for Stephen and Philip confront the narrow claim in the lawsuit for Stephen's $100,000 in damages. Philip counteroffers with $5,000, treating Stephen's lawsuit as a nuisance claim. Stephen counteroffers with $90,000 and the dance continues until Stephen asks for $40,000 and Philip offers $20,000. At the end of the day, the parties are likely to feel compelled to split the difference and settle for $30,000. This is hardly an imaginative solution.

Taking a Problem-Solving Approach[1]

Problem-solving negotiations, also called interest-based or principled negotiations, are quite different from adversarial bargaining. In a problem-solving process, the negotiator does not prepare an early opening-offer strategy to launch the negotiations or execute clever and manipulative dance strategies. Instead she begins by gathering information about each side's interests and BATNAs (Best Alternative to a Negotiated Settlement). Then she focuses on jointly developing proposals through a discussion of each side's interests and needs. She brainstorms options and selects and shapes possible solutions that satisfy the parties' interests and objective standards. Out of this process, the problem-solving negotiator constructs proposals to put on the table.

The problem-solving negotiator brings a different orientation to the negotiating table than an adversarial negotiator. The problem solver views the dispute broadly. She does not feel limited to resolving the dispute as defined in the court papers. She does not view the dispute as a limited distributive problem over money. She does not approach the other side as an arch adversary; rather she sees the other side as a collaborator in the effort to resolve a shared problem. The problem-solving negotiator will attempt to uncover underlying interests and opportunities to increase the resources (also known as "value") available to resolve the dispute. She will look for the often-repeated "win-win" and Pareto-optimal solutions and be prepared to constructively resolve any monetary claims.

In contrast with adversarial negotiators who usually have little concern for the future of the parties' relationship, problem-solving negotiators approach that relationship with respect and with an eye toward improving it even if there is no prospect for a long-term relationship.

Preparing for the Negotiation

1. Communications and Exchange of Information

The problem-solving negotiator, contrary to the adversarial one, judiciously shares information with the other side. Her first essential question will be—What information should be shared to expand the pie?

Disclosure offers benefits and poses risks because of the clash of two fundamental goals: the negotiator wants to maximize the creation of joint value and maximize personal gains from the negotiations. To achieve the former, it is desirable to make full and accurate disclosure of information about the client's key issues, interests, priorities, and potential resources. But to achieve the latter goal, it also may seem desirable to hold back (or even misrepresent) certain information to prevent being disadvantaged later when claiming value.

This hypothetical demonstrates the conflict. Suppose that Philip disliked working by himself and wants to work with Stephen again. So he discloses that interest when trying to create value. This disclosure sends a signal that the parties should focus their energies on options that involve re-hiring Philip. But Stephen could exploit this information to extract a concession from Philip: e.g., propose to rehire Philip if he will accept a lower sales commission until he pays Stephen for the lost sales. If Philip decides not to disclose his interest in working with Stephen again, and feigns disinterest in being rehired, he might lose an opportunity to be rehired at a favorable commission rate, assuming Stephen wants to rehire him.

To avoid the risks of exploitation, many attorneys instinctively play it safe by withholding information. However, this tactic can be ultimately counterproductive to achieving the best results in negotiations. Instead, problem-solving negotiators should ask—How do you disclose information in a way that will minimize the risk of exploitation? In the hypothetical, instead of disclosing his interest in being rehired, Philip could say that he might consider returning to *Shirts for You* if the terms were sufficiently attractive. This is an indeterminate, non-committal disclosure; it puts his interest on the table while reducing his exposure to exploitation. Moreover, Philip can still try to leverage favorable rehiring terms, since he can point to his impressive sales record when he was on his own. In short, creative problem solving is not about withholding information. It is about disclosing information intelligently.

2. Looking for Interests

The problem-solving negotiator searches for the interests[2] that lie beneath his client's claims by asking a simple question: "Why?" If Stephen were asked why he is demanding $100,000 in damages, he might say that he wants compensation for stolen business opportunities and recognition for training and mentoring Philip. If questioned a little further, he might elaborate. He might admit that he desires something for helping Philip get started as a salesperson and might remind Philip that Stephen is in the business of making money and Philip has hurt Stephen's business.

The damage claim is one way for Stephen to satisfy these two interests. There may be other creative ways to meet their interests.

Bringing to the surface the client's underlying interests as well as those of the adversary moves the negotiation away from a contest over competing positions.

3. Identifying BATNAs

The monetary value of each party's total BATNA is also relevant to problem-solving negotiations. This value depends on two sources of information.[3] First, counsel must assess the likely outcome at trial (which I label the public BATNA). Second, each client must estimate the personal costs and benefits of his public BATNA, for example, the aggravation and lost productivity associated with going to trial (which I label the personal BATNA). By totaling these two values and coming up with the total BATNA, each party will know the net value of what could happen if he leaves the negotiating table. The total BATNA provides the standard against which each party evaluates whether to accept or reject settlement packages.

It is not possible to fully know the adversary's public and personal BATNAs. An attorney can only guess at what point the other party is likely to call a halt to negotiations. Having an idea of the other side's BATNA helps the client understand what is potentially achievable in negotiations. The client cannot expect the adversary to agree to a proposal that is less attractive than the adversary's BATNA. A problem-solving attorney who thinks the other party has an unrealistically optimistic BATNA will prepare a plan for educating the other party.

In the hypothetical, it is not clear whether Philip's selling a different brand of shirts to a different group of customers in Buffalo constitutes a breach of the covenant not to compete. As a result, neither Stephen nor Philip can be confident about winning in court. Their mutually uncertain public BATNAs should encourage them to try to settle the dispute.[4]

4. Tentatively Estimate the Bottom Line

The attorney and client gather information on the client's likely reservation value, the client's

The Mediation Representation Formula

The thesis and coverage of this book can be encapsulated in a succinct mediation representation formula:

> In mediation, you should negotiate using a *creative problem-solving* approach to achieve the two goals of meeting your client's *interests* and overcoming any *impediments* to settlement. Your negotiation strategy should take specific advantage of the presence of a mediator at each of six *key junctures* in the mediation process.

Packed in this slender formula is an enormous amount of knowledge and skills that effective advocates should possess. Because mediation is simply the continuation of the negotiations, you should know how to negotiate as a *creative problem solver* in the mediation. You need to understand the fundamental idea of interests and how to learn about them from your client. You also need to know how to diagnose *impediments* and how to fashion ways to hurdle them. You should be familiar with what a mediator does and how a mediator can contribute to resolving a dispute so that you can develop a representation plan that takes advantage of the mediator's presence. And, you should understand the mediation process so that you can implement your plan to take advantage of the mediator's presence at each of six key junctures in the mediation.[6] Those key junctures are when you select your mediator, prepare pre-mediation submissions, participate in a pre-mediation conference, present opening statements, and participate in joint sessions and caucuses.

—Adapted from the Introduction to *Mediation Representation*, p. 7.

bottom line in the negotiations. They need to do the essential preliminary work of researching and calculating a fully analyzed BATNA. But, the client should avoid prematurely formulating a firm reservation value when participating in a problem-solving negotiation. If he formulates specific terms of settlement too early, he may cripple his ability to approach the negotiation with the flexibility necessary for thinking creatively as the negotiation unfolds.

5. Generating Proposals with the Client

Problem-solving attorneys try to stimulate their client's creative juices since the client can be a vital source of inventive ideas for settlement. The attorney's goal is not to formulate firm proposals; it is only to prod the client to think broadly, imaginatively, and outside the legal box. If in the hypothetical, Stephen is asked to think more broadly about the dispute with Philip, he may begin to imagine other ways to make money than recovering damages for lost sales. One possibility is working with Philip again. Options for working together could be explored later at the negotiation table.

Strategies at the Negotiation Table

A problem-solving negotiator approaches the other side respectfully and cordially and tries to establish a comfortable rapport and working relationship. He asks carefully framed questions and uses passive and active listening techniques. Instead of posturing and making contentious positional arguments, the problem-solving negotiator gives reasoned explanations supported by principled justifications. For example, in the *Shirts for You* hypothetical, if the parties conducted a problem-solving negotiation, Philip would not attack Stephen for interfering with his professional growth. The tone and framing would be radically different. Instead he would explain that, as a young salesperson, he felt like he was running out of opportunities to grow and needed new ones. This explanation leaves the door open for Stephen to explore how working again at *Shirts for You* might be an attractive professional opportunity for Philip.

1. Communicating Interests

As discussed above, the interests of the parties form the basis of problem-solving negotiations. Interests include not only the interests behind the parties' legal positions but also interests other than those raised in their legal papers. It is crucial for a problem-solving negotiator to judiciously advocate the client's interests to the other side and make sure that they have been understood. For example, Stephen's attorney would not advocate that Stephen be paid $100,000 because getting $100,000 is not an interest. He would advocate Stephen's interests in making money and obtaining recognition for his skills as a trainer and mentor. Stephen could make money by other means besides securing damages.

It is also necessary for the attorney and client to solidify their understanding of the other side's interests. Only then can they develop proposals acceptable to the other side.

2. Assessing BATNAs

Public BATNAs cast a shadow over all negotiations. This is evidenced by the fact that parties at the negotiating table customarily discuss, if not threaten to return to court. The more attractive a litigated outcome to one party, the less motivated that party will be to negotiate a resolution. Therefore, the parties need to assess each other's BATNA. However, it is important not to give this assessment undue attention in the negotiation in order to prevent the parties from stumbling into a positional debate that can easily escalate out of control and back into court. In the hypothetical, there is little risk of that because both Stephen and Philip realize that they face an uncertain result in court while they have attractive options for settlement. So they should be motivated to negotiate diligently to bring an end to their dispute.

3. Overcoming Impediments

As negotiations unfold, impediments to settlement commonly arise. For example, the parties may have deeply held conflicting views of critical facts or their relationship may be severely fractured. To succeed in negotiating a resolution, the parties must systematically identify impediments and ways to overcome them.[5] In the hypothetical, due to a "relationship conflict" caused by Philip's seeming abandonment of Stephen's business, Stephen may be unable to negotiate with Philip. Until Philip explains why he left to start up his own business and Stephen understands the reasons, Stephen may not be able to move forward in the negotiations.

The Importance of Non-Monetary Needs

In one employment mediation, the parties came to the table with extreme monetary claims and a long history of failed negotiations. After a little more than three hours, they negotiated a written apology from the defendant to the plaintiff, and a letter signed by the plaintiff introducing the defendant to potential buyers. After this, the monetary issues were resolved in less than a minute! The parties were apparently already on the same monetary page but were not ready to settle until some non-monetary needs were met.

4. Brainstorming Together

Producing a list of options is one of the distinctive benefits of a problem-solving process. The parties are at the negotiating table to search for inventive solutions to their dispute. Brainstorming sessions are commonly used to compile a list of uncensored ideas that can then be assessed.

5. Assessing Options

The list of uncensored options needs to be evaluated. Instead of selecting options based on brute exercise of power, parties assess and select options based on specific reasons and principled justifications. Parties may appraise options based on the following criteria: which ones further the interests of both parties, further one party's interests while not making the other party worse off, and which ones minimize harm to one party. The parties also may judge options against agreed-upon objective standards. The advantages of parties articulating specific reasons are many:

> In the process of considering possibilities, the problem solver articulates reasons why a particular solution is acceptable or unacceptable, rather than simply rejecting an offer or making a concession. Articulating reasons during the negotiation facilitates agreement in a number of ways. First, it establishes standards for judging whether a particular solution is sensible and should be accepted. If the reason is focused on the parties' underlying needs, the negotiator can consider whether the proposal is satisfactory to the parties. She need not be concerned with such conventional evaluation as "Is this the most I can get?" Or its counterpart, "Is this the least I can get away with?" Second, principled proposals focus attention on solving the problem by meeting the parties' needs, rather than winning an argument. Furthermore, continuously focusing justification on the parties' needs may cause negotiators to see still other solutions, rather than simply to respond with arguments about particular offers. The use of principled proposals can decrease the likelihood that unjustified and unnecessary concessions will be made simply to move toward agreement. Finally, the use of principled proposals causes the parties to share information about their preferences that they might otherwise be reluctant to reveal."[6]

Out of this discussion, the parties jointly develop options that become settlement proposals. But this approach does not always avoid the need for one party to put forward a "first offer" in the form of a settlement option to consider. At this advanced point in the negotiations, the offer is one based on transparent, principled justifications. The offer can be further discussed and refined by the parties.

"But, it is only about money."

For skeptics who think that problem-solving does not work for most legal cases because they are primarily about money, I offer three responses.

First, the endless debate about whether or not legal disputes are primarily about money is distracting. Whether a dispute is largely about money varies from case to case.* You have little chance of discovering whether your client's dispute is about more than money if you approach the dispute as if it is only about money. Such a preconceived view backed by a narrowly focused adversarial strategy will likely blind you to the needs of other parties and inventive solutions. You are more likely to discover comprehensive and creative solutions if you approach the dispute with an open mind and a problem-solving orientation.

Second, if the dispute or any remaining issues at the end of the day turn out to be predominately about money, then at least you followed a representation approach that may have created a hospitable environment for dealing with monetary issues. A hospitable environment for negotiating can even be beneficial when there is no expectation of a continuing relationship between the disputing parties.

Third, the problem-solving approach provides a framework for resolving issues about money. These types of disputes can sometimes be resolved by resorting to the usual problem-solving initiatives, such as interest-based discussions and applying objective standards. If these initiatives fail, you then might turn to adversarial strategies—strategies that have been tempered and modified for a problem-solving process. Instead of a combative dance with its harsh moves, you engage in a collaborative one of offers and counteroffers with reasoned discussions, anchored by a realistic assessment of both sides' BATNAs.

—From the Introduction to *Mediation Representation*, p. 5.

* In the only empirical study on the subject, Dwight Golann found that "almost two-thirds of all [mediated] settlements were integrative in nature.... The results suggest that both mediators and advocates should consider making a search for integrative outcomes an important aspect of their mediation strategy." D. Golann, "Is Legal Mediation a Process of Repair or Separation? An Empirical Study and Its Implications," 7 *Harv. Neg. L. Rev.* 301, 334 (2002) .

The classic personal injury dispute between strangers who will never deal with each other again can be only about money. This type of dispute usually is not open to creative resolutions other than a tailored payment scheme. But, even in these disputes, one side may occasionally want more than money such as vindication, fair treatment, etc.

6. Manage Remaining Distributive (Money) Conflicts

In the course of assessing and selecting options, distributive conflicts may rise to the surface. Suppose the employer in a discrimination case offers to reinstate an employee and the employee agrees. However, there is still an unresolved issue over money—the amount of back pay for the five years of discrimination. If the parties followed a problem-solving approach up to this point in the negotiations, they would have created a hospitable environment for dealing with this type of issue. Instead of engaging in adversarial bargaining, they should be able to negotiate the back-pay issue based on an objective standard,[7] like average salary increases in the employee's job category during the five relevant years. This formula is objective because neither party can readily manipulate or influence the formula's results. Thus, in the hypothetical, Stephen and Philip could agree to work together again, but still might have to determine how to share profits. They too could adopt an objective standard to resolve this distributive issue such as the percentage of business each person brings to the partnership each year.

But suppose there is another more difficult distributive issue—one not suitable for resolution by objective standards alone. If a court holds that Philip violated the non-compete clause, for instance, the parties would need to calculate the amount of sales Stephen lost. He claims lost sales in the amount of $100,000. Philip knows he will have to pay something based on his realistic assessment of his BATNA. Both parties realize how difficult it will be to arrive at an objectively proven amount and neither wants to spend large sums on experts.

Instead of belligerently threatening protracted and expensive litigation, Philip says: "We seem to be stuck over how much I will pay you. You seem to agree that it is just too difficult to calculate with confidence what you would have sold if I did not start selling shirts on my own in Buffalo. We've tried to calculate lost sales from our sales records without spending money on outside experts. What do you think of us exchanging realistic offers for settlement that are based on sales records?"

Stephen replies: "Sounds good to me. Let's use each of our audited sales records for the last 12 months."

Philip agrees: "Okay. Let me take a fresh look at those records and present an offer." (He takes time to study the sales records.)

Then he says: "Instead of starting at zero or a nominal amount, I offer to pay you $10,000. This amount is based on the assumption that the most that you lost was 10% of what I sold because you did not have the time to cultivate a significant number of new customers while still maintaining your existing customer base." (Philip is testing Stephen's good faith by seeing how he responds.)

Stephen responds: "I want to thank you for a serious although inadequate offer. I undoubtedly lost more than $10,000 in sales due to your breach of the non-compete clause. I spent considerable time trying to solicit new customers. I spent about 25% of my time on the road contacting new prospects and was specifically told by at least three of them that they were not interested because they were being served by you. After reviewing your audited sales records, I learned that I had solicited six of your customers to whom you sold $75,000 worth of shirts. Let us see if we

Key Features of Problem-Solving Negotiations

Preparation (with deep client involvement)

- Investigate Facts
- Identify Client's Interests
- Surmise Other Party's Interests
- Identify Issues for Resolution
- Investigate and Improve Client's Total BATNA!*
- Surmise Other Party's Total BATNA
- Gather Information on the Bottom Line (also known as "Reservation Value")
- Identify Sources of Objective Criteria and Value to Bring to Table
- Engage Client in Imagining Inventive Solutions
- Plan to Share Information Judiciously

Strategies at the Table

- Establish Rapport and Open up Communications
- Share Information Judiciously about Interests
- Educate Other Party about Party's Interests
- Learn More About Other Party's Interests
- Advocate for Client's Interests
- Understand Each Other's Total BATNA
- De-emphasize Legal Case (Public BATNA)
- Identify and Overcome any Impediments
- Identify Issues for Resolution
- Jointly Generate Multiple Options for Mutual Gain
- Search for Non-Monetary Solutions
- Search for Objective Criteria and Opportunities to Expand Value for Trades
- Search for Inventive Solutions that are Unavailable in Court
- Formulate a Bottom Line
- Assess and Select Options Based on Interests and Objective Standards
- Use Reasoned Explanations and Principled Justifications
- Formulate Settlement Proposals/First Offers
- Convert Emerging Settlement Proposals into Monetary Equivalents
- Compare Settlement Proposals with Reservations Value
- Manage Remaining Distributive Conflicts

* The terms Total BATNA and Public BATNA are explained on page 60.

can settle this for around $75,000, the amount of sales that would have otherwise gone to me."

Thus, the collaborative negotiation dance of offers, counteroffers, and compromises is commenced.

When Faced with an Adversarial Negotiator

There are many ways to respond when the other side engages in such adversarial tactics as making extreme demands, presenting take-it-or-leave-it proposals, hurling threats, or belittling your offers. Do not let the adversarial attorney push you to respond in kind because the negotiation can quickly spin out of control. Here are some suggestions of how to avoid the adversarial trap and even convert the other side to a problem-solving approach.

First, stay in a problem-solving mode. Judiciously share your client's interests and ask what the adversarial negotiator wants to achieve in the negotiation and why. This move initiates a problem-solving approach and educates at the same time. The more you persevere, the more likely the other side will follow suit-not because of a deliberate decision to do so, but because the adversary will likely respond to your questions and gravitate toward problem-solving behavior.

In their classic book, *Getting to Yes*, Roger Fisher, William Ury, and Bruce Patton offer this valuable advice to "prevent the cycle of action and reaction." They say:

> *Do not push back.* When they assert their positions, do not reject them. When they attack you, don't counterattack. Break the vicious cycle by refusing to react. Instead of pushing back, sidestep their attack and deflect it against the problem.... Rather than resisting their force, channel it into exploring interests, inventing options for mutual gain, and searching for independent standards. (Emphasis in original.)[8]

In *Getting Past No*, Ury explains how a negotiator can change the game by reframing the negotiation to redirect it into a problem-solving process. Instead of responding with positions, the negotiator responds with questions that focus "attention on the interests of each side, the options for satisfying them, and the standards of fairness for resolving differences."[9]

Another approach is to label the other side's tactic as adversarial, and then ask the other side to put on the table for discussion the negotiating approach that both sides would like to follow.

If an adversarial negotiator cannot be converted to a problem-solving approach, consider bringing additional people to the table. For example, if Stephen is the adversarial party and his company is a large organization, he could be asked to bring to the negotiation other people whose approval is needed to settle. If Stephen's attorney is the problem, Philip's attorney could suggest that each side bring the client to the negotiation meeting. These strategies call for considerable diplomatic skills.

Another option when a participant persists in an adversarial approach is to bring in a mediator. In disputes in which you cannot achieve the benefits of problem solving on your own, you may benefit from the assistance of a trained third party. In disputes involving a particularly hostile client, intensely bad relationships, a patently unskilled attorney, or a variety of other intractable difficulties, a mediator can bring not only her training in problem-solving methods, but also her enormously valuable asset of neutrality. Without a vested interest in the outcome, a mediator can focus credibly on facilitating a productive process so that both sides can focus primarily on resolving the substantive conflict.

Conclusion

An attorney skilled in problem-solving negotiations is ready to become an effective advocate in professionally conducted mediations. Next, the attorney needs to know how to productively enlist the assistance of the mediator and how to advocate as a problem solver at each key juncture[10] in the process. ■

ENDNOTES

[1] The ideas in this section come from Roger Fisher and William Ury classic book, *Getting to Yes—Negotiating Agreement without Giving In* (2nd ed. with Bruce Patton, 1991). The term BATNA, discussed in this section and elsewhere in the article, was coined by these authors.

[2] *Id.* at ch. 3.

[3] Appendix A in *Mediation Representation* fully explains the difference between the public and personal BATNAs, as well as how to calculate a value for each in order to arrive at the value of the total BATNA. Also see *id.* ch. 1, § 2.a.ii at pp. 20-23.

[4] In the *Shirts for You* hypothetical, we do not have any information about each party's personal BATNAs.

[5] The *Mediation Representation* book examines in detail a methodology for assessing and overcoming impediments. See ch. 3.2(b).

[6] See Carrie Menkel-Meadow, "Toward Another View of Legal Negotiations: The Structure of Problem Solving," 31 *UCLA L.Rev.* 754, 825.

[7] See *Getting to Yes*, *supra* n. 1. ch. 5.

[8] *Id.* at 108.

[9] William Ury, *Getting Past No—Negotiating Your Way from Confrontation to Cooperation*,76-104 (1993).

[10] The term "juncture" is used to identify points in the process of representation when the attorney should focus on staying in a problem-solving mode. Junctures are not the same as "stages" of mediation. Stages refer to the sequential steps that take place during the mediation process. However, junctures and stages can and do overlap.